International Journal of Cultural Property (2020) 27:349–374. Printed in the USA.

doi:10.1017/S0940739120000235

Cultural Genocide and Restitution: The Early Wave of Jewish Cultural Restitution in the Aftermath of World War II

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Abstract: Cultural restitution in international law typically aims to restore cultural property to the state of origin. The experience of World War II raised the question of how to adapt this framework to deal with states that persecuted cultural groups within their own borders. Nazi Germany's persecution of Jews and its attempt to destroy their cultural heritage began before the war and was carried out systematically throughout the war in the conquered territories. After the war, the Polish Jewish lawyer Raphael Lemkin advocated for the recognition of the new crime of genocide and, in particular, its cultural dimensions. Jewish organizations also argued that cultural destruction should be seen as an integral component of the crime of genocide and that the remedy of cultural restitution should be part of the effort to rehabilitate the injured group, but their efforts to gain recognition in the International Military Tribunal in Nuremberg for the unique harm suffered by the Jews were unsuccessful. This article discusses an innovative approach developed by Jewish jurists and scholars in the late 1940s and 1950s, according to which heirless cultural property was returned to Jewish organizations as trustees for the Jewish people. Though largely forgotten in the annals of law, this approach offers a promising model for international law to overcome its statist bias and recognize the critical importance of cultural heritage for the rehabilitation of (non-state) victim groups.

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This article grew out of a lecture I delivered in the framework of the Rose and Isaac Ebel Lecture on the Holocaust at Princeton University in March 2019. I would like to thank the participants for their insightful comments (in particular, to Leora Batnitzki and William Forbath). For comments on earlier drafts, I thank Rachel Klagsbrun, Rivka Brot, Natalie Davidson, and Ana Filipa Vrdoljak, and the participants in the Yad Vashem workshop on the practice of restitution and reparations and the historiography of the Holocaust. I thank Amnon Morag for his research assistance and Philippa Shimrat for her help in editing. The Israel Science Foundation supported this research under Grant no. 1163/19.

INTRODUCTION

The persecution of the Jews by the Third Reich involved the wholesale confiscation and plunder of Jewish assets throughout Europe, including religious and cultural objects. This was not a by-product of the genocide but, rather, an integral part of the systematic effort by the Nazis to eradicate the Jewish people and their culture. Accordingly, after the war, Jewish organizations fought for the collective restitution of libraries, archives, and religious objects to the emerging Jewish centers in the United States and Palestine. This article aims to uncover the legal innovations promoted by Jewish jurists and intellectuals in the course of the postwar cultural restitution struggle. It argues that these Jewish representatives succeeded in profoundly transforming core premises of the existing law of restitution by developing a new conception of cultural restitution as a countermeasure to the crime of cultural genocide, the methodical attempt to destroy a group by attacking its culture. For this purpose, they had to create a link between criminal and civil law; to overcome the statist bias of international law and the individualistic orientation of property law; to allow for collective restitution to a non-state victim group; to reject the backward-looking conception of restitution as a return to the *status quo ante* and, instead, promote an understanding of restitution as a forward-looking means for cultural rehabilitation and reconstruction; and to challenge private law's focus on corrective justice (according to conceptions of private property), promoting instead a holistic understanding of cultural objects as part of a living Jewish culture.

The legal framework of cultural restitution arising from the postwar Jewish struggle may provide a blueprint for the redress of cultural genocide and the rehabilitation of its victim groups. It highlights the fact that when groups experience cultural genocide, the existing law of restitution is ill fit to address their needs and may in effect serve to continue the process of cultural eradication. The traditional distinction between civil and criminal law does not allow for restitution as a remedy to the crime; the requirement of locating an individual owner, particularly when there is a large category of heirless property, leads to the dispersion of cultural objects in time and space; the reversion of heirless property to the state of origin can place it in the hands of those who collaborated in the persecution; and the perception of restitution as a means for restoring the *status quo ante* impedes its employment as a means for the reconstruction and rehabilitation of the victim group's culture.

The concept of cultural genocide has recently received renewed attention from scholars who have examined its historical origins in the aftermath of World War II as well as the legal and political reasons behind its eventual exclusion from the international law of genocide.[1] In a previous article, Rachel Klagsbrun and I examined the historical struggles over the definition of the concept of cultural genocide, focusing primarily on attempts to recognize and address the crime in

[1]Morsink 1999; A. Moses 2008, 3, 12–13; 2010; Novic 2016.

https://doi.org/10.1017/S0940739120000235 Published online by Cambridge University Press

the realm of criminal law.[2] This article directs the spotlight to the successful attempt to use the civil law track to redress cultural genocide, manifested in the Jewish struggle for postwar cultural restitution. Several historians have recently uncovered the story of this long-forgotten struggle.[3] However, less attention has been devoted to the legal innovations in the Jewish restitution struggle and their relationship to the concept of cultural genocide, which are the focus of this article.

After briefly discussing the development of the concept of cultural genocide and the attempts by Jewish jurists and intellectuals to achieve its recognition under criminal law, including in the drafting of the Genocide Convention[4] and in the Nuremberg Trials, I will explore how the premises of the existing law of restitution were transformed by the Jewish restitution struggle and will identify its novel conception of cultural restitution as a countermeasure to cultural genocide.

CULTURAL GENOCIDE

The connection between the physical and cultural aspects of genocide was first articulated by the Polish-Jewish jurist Raphael Lemkin who coined the term "genocide" in his book *Axis Rule in Occupied Europe* (1944).[5] Although today genocide is commonly understood as synonymous with mass murder, Lemkin asserted that a new legal category was needed precisely because the crime entailed far more than physical destruction or mass murder.[6] He thought that the novelty of the Nazi crime lay in the methodical attempt to destroy a national group, which extended well beyond typical war crimes and acts of repression and constituted an assault on the essential foundations of the group's life, including the disintegration of the political and social institutions of culture. For Lemkin, therefore, culture lay at the heart of genocide—a systematic attack on a group of people and its cultural identity, which is a crime directed against difference itself.[7]

Lemkin viewed genocide as a crime with both "negative" and "positive" aspects, which proceeded in two phases: "[O]ne, destruction of the national pattern of the oppressed group [the negative aspect]; the other, the imposition of the national pattern of the oppressor [the positive aspect]."[8] Understanding the centrality of cultural destruction to genocide, Jewish organizations in the wake of World War II

[2]Bilsky and Klagsbrun 2018.
[3]See D. Herman 2008; Jockusch 2012; Fishman 2017; Gallas 2019; see also notes 37–40 below and accompanying text.
[4]Convention on the Prevention and Punishment of the Crime of Genocide, 12 September 1948, 78 UNTS 277.
[5]Lemkin 1944. Already in 1933, Lemkin had defined two interrelated crimes: "barbarity" and "vandalism." Vandalism was related in his view to a systematic and organized destruction of culture. Quoted in Sznaider 2011, 83–85.
[6]Lemkin 1946, 227.
[7]See Bilsky and Klagsbrun 2018, 374.
[8]Lemkin 1944, 79.

https://doi.org/10.1017/S0940739120000235 Published online by Cambridge University Press

sought a way to connect the punitive (negative) and restorative (positive) responses to the crime.[9] Thus, alongside criminal law, which addressed genocide via corrective justice, there was a need to rehabilitate the victim group by means of a "positive" struggle for cultural restitution and reconstruction.[10]

These views influenced the drafting of the Genocide Convention in the late 1940s. An initial draft, prepared with the help of Lemkin, among other experts, included a specific provision prohibiting cultural genocide, along with a provision that required state parties to provide reparations to victims of genocide (Article XIII). The adjacent comment explained that the redress could also be for "the group as such" in the form of "reconstitution of the moral, artistic and cultural inheritance of the group."[11] Thus, a close link was initially made between reparations for genocide and the cultural aspects of genocide when trying to redress the victim group. However, the reparation clause encountered strong opposition because it introduced a collective measure into a criminal law instrument, thus threatening to undermine the principle of individual responsibility. As a result, the final text of the 1948 Genocide Convention did not include the reparations provision, notwithstanding the Jewish representatives' position about the need to bridge the divide between criminal law and civil law when combating crimes against a group such as genocide.[12]

Moreover, notwithstanding the efforts by victim groups to expand the definition of genocide, the final draft of the convention does not prohibit cultural genocide as such. Thus, the prohibition on genocide in contemporary international law is limited to physical or biological extermination.[13] The political reasons for this exclusion have been the topic of a growing body of historical-legal studies in recent years, which I discussed in my earlier article.[14] In the next part, I will briefly survey the ways in which Jewish representatives tried to promote the recognition of cultural genocide in the Nuremberg trials.

[9]See Lewis 2014, 150–80 for the role of the World Jewish Congress (WJC) and the Institute of Jewish Affairs in promoting a "victims centered new justice" through reforms of international criminal law alongside the law of restitution and reparations.

[10]N. Robinson 1944, 9. It is taken from a preface by Jacob Robinson (1972): "For years the world refused to recognize the world-wide threat of Nazi Anti-Semitism and persecution. There may now be the danger of failing to recognize the necessity of rehabilitating the damage inflicted upon the Jews."

[11]See UN Doc. A/AC.10/42, 6 June 1947, Art. XIII, reproduced in Abtahi and Webb 2008, 119–20; UN Doc. A/AC.10/42/Rev.1, 12 June 1947, Art. XIII, reproduced in Abtahi and Webb 2008, 128; UN. Doc. E/447, 26 June 1947, Art. XIII.

[12]The representative of the WJC that appeared before the Ad Hoc Committee supported the idea of reparations for genocide. Ad Hoc Committee on Genocide, Summary Record of the Third Meeting, UN Doc. E/AC.25/SR.3, 13 April 1948. The WJC worked closely with Lemkin on the United Nations (UN) legal campaign. See Loeffler 2017, 347.

[13]See Schabas 2009, 271–72. Novic (2016) shows that the prevalent view of genocide in the judgments of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Court was limited to physical genocide.

[14]Bilsky and Klagsbrun 2018.

CULTURAL GENOCIDE IN THE NUREMBERG TRIALS

According to the prevalent account, the architects of the International Military Tribunal (IMT) at Nuremberg chose the "aggressive war paradigm" as the framework for the trial because it better suited criminal law's special requirements, such as the rule against retroactivity, although there is some disagreement on the extent of, and reasons for, the neglect of the Holocaust by the IMT.[15] Accordingly, although the judgment acknowledged the new category of "crimes against humanity," it was initially limited to wartime, thereby ignoring the novel understanding of such crimes as including the persecution of groups by their own state.[16] Moreover, the judges were not persuaded that the crime of genocide was indeed part of international law and, hence, refused to use it as a distinct legal category. Rather, the judgment broke down the Nazis' systematic persecution of groups into discrete war crimes, a complete reversal of Lemkin's understanding. During the proceedings, the mass murder of the Jews underwent decontextualization and became perceived, not as a broad Nazi policy executed in stages and by various techniques but, rather, as disparate acts of war crimes perpetrated by men of the S.S. (Schutzstaffel).[17]

Jewish organizations criticized the aggressive war framework of the trial and sought to highlight the Holocaust by putting the new crime of genocide at the center of the proceedings. Realizing the opposition to their approach, they tried to gain access to the trial through legal procedures in order to promote their understanding of the crime. They thought it necessary to include representatives of the victim group in the trial and asked to join the criminal process as prosecutors alongside the Allies or at least as "friends of the court."[18] They also promoted the idea of summoning a "Jewish expert," suggesting to Chief US Prosecutor Robert Jackson that he call upon Chaim Weizmann, president of the World Zionist Organization, to provide expert testimony on behalf of the Jewish nation.[19] All of these efforts had the dual aim of gaining legal redress for genocide alongside international recognition for the Jewish people as a collective victim of Nazi persecution and a subject in international law.

[15]While some argue that the Holocaust had a significant role in the jurisprudence of the International Military Tribunal (IMT) (Marrus 1998), others believe that it was marginal because of the international criminal law's main goal of prioritizing aggressive war over atrocities (Moyn, forthcoming). See also Bloxham 2001.

[16]Lewis 2014, 169–70. "Crimes against Humanity" had created obstacles at Nuremberg due to lack of precedence and consequently played a secondary role to aggressive war and war crimes in the trial. See Shklar 1986, 162–64; Douglas 2001, 48.

[17]Stiller 2014, 107–10, 124.

[18]Lewis 2014, 166 (the WJC's demand to serve as "friend of the court" before the IMT was rejected by US Chief Prosecutor Robert Jackson on the grounds that this would open the door to similar claims by other national groups). Lemkin himself, who was one of the legal advisers to Jackson's team, engaged in private efforts to collect testimonies from potential Jewish witnesses for the prosecution. For the testimony of Rachel Auerbach that he collected in preparation for the trial, see Rachel Auerbach's testimony to Raphael Lemkin, London, August 1945, Record Group P.16, file 1, Yad Vashem Archives, Jerusalem.

[19]J. Robinson 1972; Jockusch 2012, 107.

In the end, only three Jewish victims were summoned to testify at Nuremberg (two by the Soviet team and a third by the British prosecution).[20] Their testimonies focused on the physical extermination of the Jews and not on cultural genocide. This omission is especially evident in the testimony of the most famous Jewish witness in the trial, Abraham Sutzkever, who was summoned to testify by the Soviet prosecutor.[21] Sutzkever was an acclaimed Yiddish poet who played a central role in the efforts to rescue Jewish cultural property in Vilna during and immediately after the war.[22] The Nazi assault on Vilna was especially harsh since it was one of the great cultural centers of Judaism (known as "the Jerusalem of Lithuania"). The special taskforce headed by the Nazi Party's chief ideologue Alfred Rosenberg, the Einsatzstab Reichsleiter Rosenberg (ERR), which was one of the main agencies engaged in the plunder of cultural property in occupied Europe, confiscated the Jewish libraries of Vilna, including that of the Jewish research institute established as the Yidisher Visnshaftiekher Institut (YIVO).[23] The most important books that they looted were sent to Frankfurt to the Nazi research institute on the Jewish question (Institut zur Erforschung der Judenfrage). Historian David Fishman relates the story of a group of Jewish forced laborers made up of Yiddish poets and scholars, including Sutzkever, who had to sort the books for transfer to Germany. While doing so, they formed a clandestine group (known as "the paper brigade") to smuggle important materials from YIVO into the Vilna ghetto in order to salvage them.[24]

These efforts were continued after the war by the few survivors who had personally witnessed the central role played by the attack on culture in the Nazi genocidal policy and sought to reverse its course by documenting the crimes and salvaging the cultural remains. Sutzkever returned to Vilna in July 1944, shortly after its liberation and, as part of these efforts, helped to establish a Jewish Museum in Vilna, which served as a repository for the city's surviving Jewish cultural treasures, including books, art, manuscripts, and archives from YIVO, the Strashun Library, and other Jewish institutions.[25] He also participated in a collective effort to document Nazi crimes against the Jewish people in German-occupied Soviet territory. In *The Black Book*, he described the attempts of the Rosenberg office not only to

[20]Douglas 2001, 78; Jockusch 2012, 120.
[21]Hirsch, 2020, 228–30, 237–38.
[22]Fishman 2017, 198–200; Glickman 2016.
[23]Leff (2015, 86–88) observes that particularly important operations were carried out in Vilna, where the Einsatzstab Reichsleiter Rosenberg (ERR) removed an estimated 100,000 books from the city's famous Jewish libraries. In fact, the ERR used Yidisher Visnshaftiekher Institut's (YIVO) library as its base of operation in Vilna.
[24]Fishman 2017, 75–81.
[25]Fishman 2017, 145–52. The Jewish Museum (1944–49) was founded by Sutzkever and two other Holocaust survivors, the poets Shmerke Kaczerginski and Abba Kovner. In its activities, explains Fishman, it became the first "Holocaust museum."

destroy, but also to collect, Jewish cultural artifacts.[26] Sutzkever compared the physical attack on the Jews to the cultural attack on their books: "Rosenberg's office hunted down the printed Jewish word with the same zeal and relentlessness that the Gestapo exhibited when tracking down every last hidden Jew."[27]

In the IMT in Nuremberg, Rosenberg was indicted, among other things, of the organized plunder of both public and private property throughout Europe (as war crimes), and he was eventually convicted on all four counts of conspiracy, crimes against peace, war crimes, and crimes against humanity and sentenced to death. Fishman reveals that Sutzkever's notes in preparation for his testimony show that he had intended to speak at length about the looting and destruction of Jewish cultural treasures by Rosenberg's unit (the ERR). [28] However, the Soviet prosecutor refrained from asking him about these issues. This omission is particularly glaring given the importance the Soviet prosecution attributed to presenting evidence of the destruction of Russian culture in the trial, including bringing two witnesses who testified on the issue and the projection of a documentary film dedicated to cultural destruction.[29] The Soviet prosecutor denied Sutzkever's request to testify in his mother tongue—Yiddish, the language of most of the murdered Jewish victims—because it was not an official language in the trial (and there were no translators from that language).[30] Consequently, Sutzkever had to testify in Russian.

Within the confines of his testimony, all he managed to do was to hint at the Jewish cultural dimensions of the Nazi prosecution, such as when German soldiers had compelled him, a rabbi, and a boy from his neighborhood to dance naked around a bonfire in front of the old synagogue, while throwing its Torah scrolls into the flames.[31] Within the constraints of criminal procedure, his testimony tended to depict the Jews as passive victims of Nazi persecution, leaving out the active efforts at cultural rescue and resistance that he and his friends in the "paper brigade" had undertaken.[32] His frustration with his interrogation might explain the unusual step he took. When Sutzkever was asked to leave the witness stand, he directly addressed the judge, without permission from the prosecutor and, in violation of protocol,

[26]Sznaider 2011, 100–1; Jockusch 2012, 120. *The Black Book: The Nazi Crime against the Jewish People* (1946) was commissioned by the WJC to serve as an indictment of the Holocaust and documentation of evidence in this regard. It was submitted as evidence at the Nuremberg Trials.
[27]See Sutzkever, "The Vilna Ghetto," cited in Gallas 2012, 78n. 18.
[28]Fishman 2017, 198–99; Sutzkever testified on 27 February 1946. See Testimony of Abraham Sutzkever, *Nuremberg Trial Proceedings*, vol. 8, 27 February 1946, 301–7, https://avalon.law.yale.edu/imt/02-27-46.asp (accessed 2 June 2020).
[29]The two Soviet witnesses on cultural destruction were Joseph Orbeli (Armenian academic and director of State Hermitage Museum) and Yuri Dmitriev, an expert on ancient Russian art. The film was called *The German Fascist Destruction of Soviet Cities.* Hirsch 2020, 228, 232–33, 239–40.
[30]Jockusch 2012, 108. There were only four "official" languages at the Nuremberg proceedings: English, Russian, French, and German.
[31]*Nuremberg Trial Proceedings*, vol. 8, 27 February 1946, 302–3; Gallas 2019, 1.
[32]Fishman 2017, 198–99.

offered to submit a Gestapo document that he and his friends had collected, which could substantiate his testimony about the mass murder of Jews in Ponary.[33]

A close reading of Sutzkever's testimony reveals the alternative approach to the Nuremberg trial that the Jewish victims sought to advance: the attempt to link the new crime—genocide aimed at destroying a group and its culture—to questions of cultural restitution and reconstruction. Sutzkever's testimony provides several clues to the radical alternative that Jewish representatives offered to the vision of international criminal law promoted by the Allies in the Nuremberg trials. First, seeking to undermine the reduction of genocide to physical destruction, Sutzkever's testimony dwelled on the burning of Torah scrolls and the humiliation of rabbis and the intelligentsia as intrinsic to the crime. As we have seen, this was only a hint at the bigger story that Sutzkever had wanted to relate in his testimony, which would have elaborated at length on the systemic attack on Jewish culture carried out by Rosenberg's unit in Vilna.

Second, in contrast to the statist bias of international law, which subordinated the victim group to the nation-state, Sutzkever's testimony was intended to achieve direct acknowledgment of the Jews as a distinct victim group and of the unique damage they had suffered. To this end, he asked the Soviet prosecutor to testify in Yiddish, the language of the murdered Jews.[34] In his diary notes from 17 February, he explains that he saw testifying in Yiddish not as a technical matter but, rather, as a matter of principle with symbolic meanings:

> I want to speak in Yiddish. Without a doubt, Yiddish … I want to speak in the language of the people whom the men in the dock tried with all their might to exterminate, together with their language. Thus, our mother tongue will be heard … at Nuremberg as a symbol of our immortality.[35]

Sutzkever had wanted the victims' language to be heard in the Nuremberg trials as a countermeasure to the genocide and as a symbol of the immortality of the Jewish people. However, since he was made to testify in Russian, his testimony was heard as part of the larger story of the suffering of the Soviet people as a whole.[36]

Third, contrary to the conventional view of criminal law that sees the victims as passive and limits their role in trials to witnesses on behalf of the prosecution, Sutzkever, a Jewish partisan, sought to return the initiative to the victims. His planned testimony on the "paper brigade" in the Vilna ghetto was intended to present the Jewish victims' efforts to salvage their culture during the war as a kind of spiritual resistance to the crime, which continued after the war in the form of the survivors' initiatives for cultural restoration, like the establishment of the Jewish Museum. His testimony was to have presented the victims as taking their fate into their own hands and to have shown the enormous importance that they attached to

[33]Fishman 2017.
[34]Jockusch 2012, 108.
[35]Sutzkever 2015, 118–19 (my translation).
[36]Hirsch 2020, 238.

protecting the remnants of their culture. When the Russian prosecutor failed to ask him about these issues, Sutzkever made a direct appeal to the tribunal judge and received permission to present the court with incriminating evidence collected by the victims themselves. With this subversive move, Sutzkever sought to make the victims active and equal partners in the trial of the Nazi perpetrators.

The Jewish victims' vision for international criminal law, as indicated by Sutzkever's testimony, would have required profound changes in the Nuremberg trials. It would have been necessary not only to recognize cultural genocide as a crime under international law but also to recognize a non-statist victim group, the Jewish people, as a subject in international law. However, after the efforts of Jewish representatives to influence the criminal law channel at Nuremberg failed, they turned to the private law channel of cultural restitution, where they found a fertile ground for developing their alternative approach to international law. In the following parts, I will explore how Jewish organizations translated their conception of cultural genocide into a policy of collective cultural restitution to the Jewish people.

THE EARLY STRUGGLE FOR JEWISH CULTURAL RESTITUTION

If we limit our view to international criminal law, we may conclude at this point that the law failed to address the cultural dimensions of the genocidal attack against the Jewish people, such as the plunder of cultural property. However, a very different picture emerges when we turn our attention to the creative ways in which Jewish organizations and prominent Jewish jurists, in the wake of World War II, sought to harness private law to achieve the restitution of cultural property to the Jewish people. As noted, to succeed in the restitution struggle they had to transform some of the core premises of restitution law and create a new paradigm of cultural restitution conceived as a countermeasure to the crime of cultural genocide.

This postwar Jewish cultural restitution struggle has recently attracted the attention of several historians. Elizabeth Gallas has examined the early international Jewish struggle for restitution of looted Jewish cultural property that was captured in the occupation zones of the Western Allies, while David Fishman has described attempts to rescue and salvage Jewish cultural objects in Vilna during and after the war.[37] Other scholars have focused on different organizations that led the struggle, such as Gish Amit, who examined the history of the Hebrew University's Va'adat Otzrot ha-Golah (Diaspora Treasures Committee), and Dana Herman who related the story of Jewish Cultural Reconstruction (JCR).[38] Natan Sznaider has examined Hannah Arendt's work for the JCR, while others have studied the activities of Gershom Scholem, who traveled on behalf of the Hebrew University to Europe to take stock of stolen Jewish cultural goods.[39] Yet other studies are devoted to the

[37]Gallas 2012, 2015, 2019; Fishman 2017.
[38]D. Herman 2008; Amit 2014.
[39]Schidorsky 2006; Sznaider 2011; Zadoff 2015.

https://doi.org/10.1017/S0940739120000235 Published online by Cambridge University Press

restitution of specific types of cultural property, such as Jason Lustig's article on the restitution of archives.[40]

While the historical research has noted some of the legal innovations of these restitution struggles—particularly, the recognition of a non-state collective as a subject of international law and the success of international Jewish organizations in prevailing over the state of origin—it has largely overlooked the transformation in the very concept of restitution wrought by their struggle.[41] In the following parts, I will highlight the various facets of the conception of cultural restitution promoted by the Jewish organizations as a countermeasure to the crime of cultural genocide[42] and analyze the legal obstacles they faced and the important legal innovations they introduced. In particular, I discuss three main changes they introduced to core premises of restitution in international law:

- from individual restitution of private property to collective restitution to the victim group;
- from a backward-looking return to the *status quo ante* to a forward-looking restitution as a means for cultural rehabilitation and reconstruction;
- from a conception of "property" focused on the economic value of the cultural objects to a more holistic understanding of cultural objects as aspects of a Jewish culture that was to be reconstructed and rehabilitated.

COLLECTIVE RESTITUTION TO THE JEWISH PEOPLE

Books stood at the center of this early Jewish cultural restitution struggle. As a prominent figure in this struggle, Salo Baron, professor of Jewish history at Columbia University, noted in 1945: "Books have always been the very life-blood of the 'people of the Book.'"[43] They bore a dual symbolic meaning as both "carriers" of memory and transitional objects for the future reconstruction of the group's culture and identity. At the end of World War II, American troops discovered depots filled with millions of books that had been seized by the Nazis throughout Europe. "[B]y one of the great and ironical paradoxes of human history," wrote Jerome Michael, professor of law at Columbia University, to the American General J. H. Hilldring, "at

[40]Lustig 2017.

[41]See Vrdoljak 2011 (Vrdoljak offers an analytical framework to discusses the link between genocide and restitution by tracing the evolution of international criminal law instruments to protect the world's culture).

[42]O'Donnell (2011) examined the link between restitution as a form of rehabilitation under transitional justice mechanisms and referred to Holocaust-related cases to examine this relationship. Yet she focused on individual restitution of highly valued works of art and not on the collective restitution of other, more mundane cultural objects.

[43]Baron 1945, 5. The centrality of books to the reconstruction efforts can be gleaned from the correspondence between Hannah Arendt and Gershom Scholem, who collaborated in this endeavor. See Arendt and Scholem 2017.

the same time that the Nazis were exterminating the Jews of Europe they were carefully and methodically collecting and preserving Jewish religious and cultural objects and employing them as a means to Jewish annihilation."[44] Most of these books were transferred to what came to be called the Offenbach Archival Depot, a collecting point for looted books and ritual objects in the American Zone of Occupation.

Although, as a signatory to the Inter-Allied [London] Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control,[45] which was signed on 5 January 1943, the American occupiers were committed to cultural restitution, the few existing international laws and treaties seemed extremely inadequate to deal with the complexity of the situation.[46] The basic rule of restitution in international law stipulates return to the state of origin, and the state is then required to return the property to its original owner. "Heirless property," according to the Escheat doctrine, reverts to the state.[47] Consequently, Jewish organizations feared that the huge amount of heirless Jewish property, including around half a million books in the Offenbach Archival Depot whose owners could not be identified, would be returned to states that had participated in the persecution and plunder. In particular, they thought it would be a colossal injustice if the German states, the successors of the Third Reich, would become the rightful successors of the property of murdered Jews. Already in 1943, Jewish jurist Ernest Muntz wrote:

> In countries which will be found guilty of the mass extermination of the Jews, it would only be just to prevent the State from inheriting the estates of the murdered. These properties should be utilized … for the relief of the surviving. … In view of the tragedy of the situation, it may really be hoped that claims falling into this category will thus be made use of for Jewish reconstruction purposes.[48]

The Allies' initial policy to return identifiable cultural property to its state of origin was therefore "morally unacceptable" to the Jewish organizations.[49] In the

[44]Jerome Michael, memorandum submitted by the Commission on European Jewish Cultural Reconstruction to Assistant Secretary of State General J. H. Hilldring, 5 June 1946, 2, file ARC 4o 793/212.1, National Library of Israel Archives. Michael was referring to the pseudo-scientific institutions established by the Nazis to justify their virulent propaganda, which accumulated mass quantities of Jewish books and religious artifacts.

[45]Inter-Allied [London] Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, reprinted in *Department of State Bulletin* (1943) 8: 21.

[46]See Simpson 1997, 287. Numerous international agreements and national trends made the American government inclined to return Jewish property that had been seized not just in wartime but also during the entire Nazi regime. See Kurtz 2009. In addition, the Americans, unlike their Allies, did not suffer losses on their own territories and, hence, were not looking for reparation or compensation.

[47]See N. Robinson 1944, 256; *Columbia Law Review* 1961, 1319.

[48]Munz 1943, 377.

[49]See the position articulated in the Commission on European Jewish Cultural Reconstruction, *Survey of the Legal Situation*, 1946, cited in Gallas 2015, 34; and the report of the legal commission of the Hebrew University's Diaspora Treasures Committee, 26 February 1946, which argued that Germany

case of states where most of the former Jewish population had perished in the Holocaust, it would effectively mean that Jews would no longer have access to their cultural treasures. Jewish international organizations argued, therefore, that, in the unique situation of Nazi persecution, a collective crime of genocide that targeted the Jews as a group, "[t]he Jewish people as such, represented by the body representative of Jewish people shall be granted a collective claim to heirless individual property as well as to the destroyed Jewish communities and institutions."[50] This position was clearly articulated in a letter sent by Chaim Weizmann in the name of the Jewish Agency to the four Allied governments in September 1945:

> Such properties belong to the victim, and that victim is the Jewish people as a whole. The true heir, therefore, is the Jewish people, and those properties should be transferred to the representative of the Jewish people, to be employed in the material, spiritual and cultural rehabilitation of the Jews.[51]

However, no precedent existed in international law for recognizing a non-state actor—"the Jewish people"—as a legal entity with a right of succession for heirless Jewish property. The task of reforming international law was first undertaken at the level of legal theory in two pathbreaking books published in 1944: Siegfried Moses's *Jewish Post-War Claims*, and Nehemia Robinson's *Indemnification and Reparations: Jewish Aspects*.[52] Both books advocated a fundamentally new, collectivist approach to the problem of Jewish restitution and reparations, which would allow international Jewish organizations to claim the property of obliterated Jewish communities as the property of a stateless collective—the Jewish people.[53]

In order to translate these new theories into international law, there was a need to create a representative claimant that could speak on behalf of the Jewish collective and take part in creating an adequate restitution policy. The initial restitution law implemented by the Americans presupposed the existence of individual claimants for stolen goods and failed to address the issue of heirless property.[54] To overcome this lacuna, Jewish groups formulated the innovative concept of a "successor organization" for Jewish heirless property and, subsequently in May 1947, incorporated a Jewish Restitution Commission in New York, consisting of national and

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could not be the legal successor since Jewish heirless property was the result of its own systematic mass murder of the Jews, as established by the IMT. Cited in Zadoff 2015, 207; see also Schidorsky 2006, 198–203; Bentwich 1956, 207.

[50]S. Moses 1944, 78; compare Munz 1943, 373.

[51]Cited in Takei 2002, 268n. 11. The Jewish Agency was inaugurated in 1929 as a representative body for the organized Jewish community in Mandatory Palestine with the goal of promoting Jewish immigration and administering the affairs of the community.

[52]S. Moses 1944; N. Robinson 1944.

[53]Sznaider 2011, 42. For a contemporary critical review of the "collectivist" approach recommended by S. Moses's and N. Robinson's books, see Weil 1946, 222; see also Marrus 2009, 65–67.

[54]Military Government Law no. 52 on the Blocking and Control of Property in the German Reich and Its Organizations, 1 June 1946. See Gallas 2019, 94.

international Jewish organizations (and which, a year later, changed its name to the Jewish Restitution Successor Organization [JRSO]). As stated in its certificate of incorporation, it defined itself as the successor to "Jewish persons, organizations, cultural and charitable funds and foundations, and communities, which were victims of Nazi or Fascist persecution and discrimination, in all matters relating to claims for the restitution of property and property rights of every nature and description."[55]

Although international Jewish organizations agreed that, in the case of heirless property, restitution should be directed to the Jewish people as a collective rather than to the territorial state of origin, they strongly disagreed on who precisely was the proper heir for Jewish cultural objects. The main competition was between the Jerusalem-based Va'adat Otzrot Ha-Golah, a group established in 1946 at the Hebrew University, and the New York-based Jewish Cultural Reconstruction Commission (established in 1944), headed by Salo Baron.[56] In a nutshell, the Hebrew University claimed that it should be the sole trustee for cultural objects because the center of Jewish life had moved to the land of Israel, in no small part thanks to the creation of the Hebrew University and the National Library. In contrast, Baron's commission argued that it should be the trustee, as it anticipated the ascendance of American Jewry as the leader of postwar Jewish culture.[57]

After a prolonged internal struggle, they realized that the competition between the groups hampered their collective efforts. Acknowledging the relative advantage enjoyed by Salo Baron's New York-based commission *vis-à-vis* the American authorities, they therefore decided in 1947 to collaborate under one umbrella organization, Jewish Cultural Reconstruction (JCR), which served as the cultural arm of the JRSO.[58] In so doing, "[they] aspired to represent all of Jewry, balancing the needs and interests of each community and allocating public Jewish funds wherever the needs were greatest."[59] However, in order to gain official recognition, this organization needed to engage in a prolonged legal and political struggle both externally—with the four occupying forces (most importantly, to gain the recognition of the American army)—and internally, with the various Jewish communities in Europe.

Several historians who have examined this struggle claim that the Jewish organizations were able to succeed because of the receptivity of the Americans to their

[55]Quoted in Takei 2002, 269; see also Gallas 2019, 95.
[56]Sznaider 2011, 58–59; Zadoff 2015, 207.
[57]Baron 1942, cited in D. Herman 2008, 47.
[58]See Gallas 2015, 35; 2019, 83–89. Baron's commission distinguished itself in its research on Jewish cultural losses in preparation for postwar restitution. In 1946, the first of five "Tentative Lists" documenting Jewish cultural treasures in Axis occupied countries were published in the journal *Jewish Social Studies*, which was established and edited by Baron. These lists eventually served as the basis for a detailed memorandum submitted to the Office of Military Government.
[59]D. Herman 2008, 106, citing Zweig 1988, 142.

moral claims. Indeed, the Americans were the only occupying power that initially agreed to the idea of a Jewish successor organization since the Soviets believed heirless assets should become state property, the French argued for establishing an agency that would assist all Nazi victims, not merely Jews, and the British, fearing that assets transferred to an outside Jewish successor organization might be used for augmenting Jewish settlements in Palestine, urged that heirless property revert to a German relief agency.[60] But no less important in my view were the legal innovations to the law of restitution advanced by Jewish groups. Jerome Michael, one of the founding members of the JCR, suggested that they rely on the legal institution of trusteeship, instead of on property law, and that a representative Jewish corporation should assume a trusteeship function for Jewish cultural objects.[61] This would allow Jewish organizations the flexibility to consider the interest of the Jewish people as a whole, and to take account of changing conditions, in contrast to the rigid property considerations of restitution law, which focused on identifying previous owners.

On 15 February 1949, after long negotiations, the American military government signed a unilateral agreement [the Frankfurt Agreement] with the JCR, in which the latter agreed to act as the trustee "[I]n receiving this property for the Jewish people and in distributing it to such public or quasi-public religious, cultural, or educational institutions that it sees fit to be used in the interest of perpetuating Jewish art and culture."[62] Thus, we see how an established institution of private law—trusteeship—was utilized in these unique circumstances to fill a legal lacuna (regarding heirless property) to allow redistribution of cultural objects aimed at the rehabilitation of the Jewish people. The symbolic importance of recognizing a Jewish trustee for Jewish cultural property was summarized by the JCR's president, Salo Baron: "This is one area in which Jews speak as Jews—not as displaced persons or refugees. The Jewish element is clearly defined—Jewish cultural treasures, Jewish religious objects, Jewish interests."[63] The contrast with the Nuremberg trials, where Sutzkever was made to testify in Russian instead of Yiddish, is pronounced. It was in the civil law track, through the struggle over heirless Jewish books pillaged by the Nazis from all over Europe, that "the Jewish element" became apparent. The private law of restitution, as opposed to criminal public law, enabled Jewish representatives to take the initiative and exercise their agency, speaking on behalf of a Jewish collective.

[60]See Kurtz 1998, 632. By the autumn of 1947, the United States, France, and Great Britain came to a compromise that each zone commander could choose the successor organization he wanted. This enabled the Americans to recognize the Jewish Restitution Successor Organization.
[61]D. Herman 2008, 76.
[62]"Memorandum of Agreement, Subject: Jewish Cultural Property," RG 260, box 66, National Archives and Records Administration, College Park, MD. See Waite 2002, 222n. 48. See also Kurtz 1998, 640; Gallas 2019, 113–17.
[63]Minutes of Commission Meeting, 12 May 1946, cited in D. Herman 2008, 77n. 151.

"FORWARD-LOOKING" RESTITUTION

Although, after a struggle, restitution law allowed Jewish groups to assert their collective agency, it also imposed formidable constraints. The basic rule of restitution—"a return to the status quo ante"—conflicted with the Jewish organizations' efforts to move the cultural objects to the new Jewish centers outside Europe. To overcome this obstacle, they needed to change the direction of restitution, to allow for "forward-looking" restitution to be used as a basis for a future-oriented cultural renewal. Here, again, Jewish jurists demonstrated their ingenuity. In order to accentuate the link between genocide and restitution, they focused on the plight of the Jewish refugees in the displaced persons (DP) camps, the majority of whom refused to return to their home states.[64]

Since the administration of the DP camps was a burden on the American government, the American policy was that restitution of non-monetary gold would be used to finance refugee programs.[65] This created a first link between questions of resettlement, restitution, and reparations. A further link was made when the American army, responsible for the Offenbach Archival Depot, agreed to a request by the American Jewish Joint Distribution Committee in late 1945 to loan 25,000 non-valuable Jewish books to the DP camps to help alleviate survivors' spiritual suffering.[66] Creating a link between reparations and the rehabilitation of refugees was in line with the policy of the Allies, who feared repeating the punitive reparation scheme of the Treaty of Versailles because of its devastating repercussions. The emphasis was therefore changed from the moral guilt of perpetrator states (retribution) to the needs of the victims (rehabilitation/welfare).

In anticipation of this change, Siegfried Moses, in his 1944 book *Jewish Post-War Claims*, advocated that the Jews abandon the idea of punitive reparations and rely on arguments advanced by the Russians about reparations as a way for economic reconstruction. He argued that

> [t]he Jewish People is one of the nations who must most certainly be allowed a claim for reparations if Germany is to pay any reparations at all. For, the Jewish People needs reparation because a very large part of the economic assets of the Jews have been destroyed and the work of rebuilding Palestine, by means of which a fresh groundwork must be established for the existence of Jews deprived of their sources of livelihood, urgently requires complementary economic assets.[67]

[64]See Munz 1943, 377. Conditioning restitution upon the return of refugees to their homes is still prominent in international law. For criticism, see Zweig 1988; Smit 2013.
[65]See Zweig 1988, 68.
[66]Leff 2015, 125.
[67]S. Moses 1944, 15. We can see how this idea was adopted by the legal subcommittee of Otzrot ha-Golah of Hebrew University. For example, the committee proposed that priority be given to Jewish institutions in England that had been harmed by the German bombardments. See Schidorsky 2008, 231.

With this formulation Moses also shifted the geographical locus of reparation from Europe to Palestine, stressing that this was the desired destination of the Jewish refugees. Judah Magnes, the president of the Hebrew University advanced a similar position in relation to cultural objects:

> We are the chief country for the absorption of the living human beings who have escaped from Nazi persecution. … By the same token we should be the trustee of these spiritual goods which destroyed German Jewry left behind. We are anxious that the Jews of the world should recognize that it is our duty to establish our spiritual and moral claim to be in the direct line of succession to the Jewish culture and scholarship of European Jewry.[68]

As noted earlier, the existence of a large category of "heirless cultural property," 95 percent of which belonged to Jews,[69] helped undermine the priority given to "private property" in restitution law. Moreover, the focus of Jewish advocates on "cultural objects" such as books and archives, which ordinarily do not carry great economic value outside the communities that rely on them for their religious and spiritual practices, helped minimize the property concerns of the Americans. However, in order to change the restitution policy of the Allies, there was a need to give these demands a firm legal basis by articulating a new rationale for the law of restitution.[70] Nehemia Robinson in his 1944 book *Indemnification and Reparations* distinguished between "restorative" and "constructive" measures. The former, he explained, are aimed primarily at individual compensation and restitution. The latter, in contrast, consider the persecuted group collectively as a victim and aim to use the looted property to help it forge a new beginning.[71] Relying on this novel legal theory, Baron's commission suggested that the American army shift its restitution policy from restoration to redistribution:

> In view of the wholesale destruction of Jewish life and property by the Nazis, reconstruction of Jewish cultural institutions cannot possibly mean mechanical restoration in their original form or, in all cases, to their previous locations. The commission intends, in collaboration with other agencies of good will, to devise if necessary some new forms better accommodated to the emergent patterns of postwar Europe. Ultimately it may also seek to help redistribute the Jewish cultural treasures in accordance with the new needs created by the new situation of world Jewry.[72]

[68]Judah Magnes, letter to Koppel S. Pinson, 3 May 1946, cited in Gallas 2015, 46n. 75. Already on 4 May 1945, Magnes wrote to Chaim Weizmann that the books belonged at the Hebrew University as it was creating a central library for the Jewish People and that it was in Jerusalem that the largest number of prominent Jewish scientists in the world could be found, for whose research these books could be of much assistance. See Zadoff 2015, 207.

[69]See Kurtz 1998, 639.

[70]Indeed, non-cultural property restitution plans at the time were firmly anchored to "corrective justice" approaches (return to *status quo ante*). This only began to change in the 1990s. See Veraart 2016, 969.

[71]N. Robinson 1944, 154–55, discussed by Dean, Goschler, and Ther 2007, 114.

[72]Cited in Kurtz 1998, 630.

Debating the Location of Cultural Reconstruction

The transformation of restitution law from "restoration" to "reconstruction" shifted the emphasis to the new goals of cultural restitution, but it also gave rise to a new problem, as it did not provide a clear answer to the question of where such "forward-looking" reconstruction should take place. Historians have pointed to the conflict that ensued between the Hebrew University and the JCR regarding the destination of the books—whether the Jewish center in Palestine should be recognized as the sole heir to heirless cultural objects or whether they should be distributed equitably among the various Jewish centers in the world.[73] This disagreement however was resolved politically, when the various Jewish organizations came together and recognized the leadership of the JCR. For the purposes of our discussion, the more interesting conflict that ensued was between the international Jewish organizations and the Jewish communities in Europe as it was here that the controversy was translated into conflicting legal arguments.

Although Baron's commission initially supported the Allied plan that Jewish reconstruction should take place within Europe, after investigating the situation of the Jewish communities in Europe they came to the conclusion that the future of Jewish life would be outside that continent. As Biblical scholar Theodor Gaster wrote in 1945, "[t]he distribution of the Jews will inevitably undergo a profound change. What then will be the use of restoring their former cultural and educational institutions on the old basis? Clearly, our problem will be one of redistribution rather than reconstruction."[74] This inevitably led to a clash between the JCR and the surviving Jewish communities in Europe, and the dispute was brought for resolution to the American authorities.[75] The Americans, who generally agreed to the idea of a collective restitution to a Jewish trusteeship for cultural property, opposed the JCR's policy that cultural property formerly owned by Jewish communities in Germany should only be returned in proportion to their actual needs since, in their view, these communities were the rightful owners. In response to these concerns, writes Gallas, the JCR and the JRSO "stressed that many collections and items found on German territory had not belonged to German Jews, but were booty looted from locations throughout Europe." They also "deemed it unjust that the few remaining Jews in Germany should receive the material remains of the over 550,000 who had lived in Germany before 1933."[76]

After a prolonged legal struggle with the remnants of Jewish communities, the American military court of appeals accepted the JRSO's arguments that the military

[73]D. Herman 2008; Gallas 2015.
[74]Gaster 1945, 267. Indicative of this is the change in name of Baron's commission, the European Jewish Cultural Reconstruction, which dropped "European" from its title and became Jewish Cultural Reconstruction. Gallas 2019, 95.
[75]For the struggle with Jewish communities in Germany, see Takei 2002.
[76]See Gallas 2015, 38.

https://doi.org/10.1017/S0940739120000235 Published online by Cambridge University Press

restitution law (Law no. 59)[77] should be interpreted in accordance with the new realities: "It is a measure of justice and equity that steps be taken to preserve for all surviving victims of Nazi persecution such property as can now be recovered, rather than to hand over to a few survivors in particular localities former community property which should serve broader interests."[78] Thus, principles of equity came to replace principles of prior ownership in the American policy of cultural restitution. The legal struggle led the Americans to uphold the JCR's position that the cultural objects be distributed by the JCR to Jewish communities according to the size of their population, their prospective religious and cultural needs, the long-term stability of the recipient organizations, and their ability to care for those objects.[79] In the end, 40 percent of the heirless books in the Offenbach Archival Depot were sent to libraries in Israel; 40 percent to libraries in the United States, and 20 percent to libraries in the rest of the world.[80]

However, the situation on the Soviet-controlled side presented even greater challenges. As a general rule, the Soviets believed that property restitution should be made available as compensation for losses and damages incurred by what had become its territory and, on principle, refused to distinguish between the fate of Jewish and "general" property.[81] As a result, Jewish organizations feared that cultural property returned to the Soviet Union would be lost to the Jewish people. In this context, Max Weinreich, the director of the New York YIVO and one of the few survivors from the original staff of the destroyed Vilna YIVO, eventually managed to persuade the Americans to recognize his institute as the formal successor to the Vilna YIVO and to allow the transfer of its archive and books from Offenbach to New York.[82] Other Eastern European Jewish survivors who had been involved in the clandestine attempts to rescue Jewish culture during the war "stole" back cultural objects that were salvaged by them and illegally sent them to the New York YIVO. Here again we meet Abraham Sutzkever. After he realized that the Jewish Museum he had helped found in Vilna after the war would not survive in Soviet Lithuania, he too began to "steal" Jewish books and artifacts and send them to the YIVO in New York.[83]

[77]Military Government Law no. 59: Restitution of Identifiable Property, *Military Government Gazette*, Germany, United States Area of Control, Issue G, 10 November 1947.

[78]For the legal struggle with the Augsburg community and its significance, see Takei 2002, 277–79. The quotes from the court's decision are taken from this article. See also Lustig 2017.

[79]See D. Herman 2008, 125, 227.

[80]Priority was given to the Hebrew University in choosing books not already in its collections. Communities remaining in Germany received mostly prayer books and Judaica. Communities in the United States received books after completing questionnaires about the size of their Hebraica and Judaica collections and the number of readers in their libraries. All libraries that received books had to undertake not to sell them and to comply with any requests for individual restitution filed within two years of receipt of the books. See Schidorsky 2008, 231.

[81]See Gallas 2019, 45–46.

[82]Gallas 2019, 42–45.

[83]Leff 2015, 87.

CULTURAL RESTITUTION AS A COUNTERMEASURE TO GENOCIDE

The most innovative change brought about by the Jewish restitution struggle was the understanding that restitution is not simply, or mainly, a property remedy for a wrong but, rather, a countermeasure to cultural genocide. Here, our two roads meet. We began the article with Lemkin's insistence on recognizing the link between the physical and cultural aspects of genocide. Jewish organizations sought to bring this understanding of genocide to bear on the restitution policies of the Allies. For example, in a memo written by the Hebrew University's Va'adat Otzrot ha-Golah, the committee argued that the regular laws of restitution must be overridden in the particular case of "heirless Jewish property" resulting from the crime of cultural genocide. The moral basis for the Jewish restitution claim stemmed from the nature of the German attack against the Jews, which "was not directed against [Germany's] Jewish citizens as individuals, nor against Germany's Jewish collective as such, but against the entire Jewish people, including its physical existence, its religious doctrines and spiritual culture." The committee further justified its claims by referring to the Nuremberg indictment, which, according to the memo, had recognized the crime of genocide and charged Alfred Rosenberg with carrying out the systemic plunder of Jewish cultural treasures.[84] Similarly, the legal committee of the JCR, headed by Jerome Michael, sent a memo to the US State Department arguing that the objective of restitution ought to be the cultural reconstruction of the Jewish people since they had been subject to genocide. Accordingly, restitution must not be reduced to categories of prior ownership but rather ought to be understood in holistic terms of reconstructing the persecuted culture.[85]

The link between the crime of genocide and the restitution claims was translated into several principles. First, the Jewish organizations rejected an understanding of culture as something static that should be preserved in a museum. Thus, they vehemently opposed a proposal by the Danish government to UNESCO in 1945 to create a central library of Jewish books in Copenhagen that would house heirless Jewish books, preserving them as a European heritage. Instead, they advocated a perception of culture as dynamic, as a living culture that could change along with the changing conditions of its subjects. As Judah Magnes explained, they were interested not in "a museum of historical objects" but, rather, in "Jewish creative scholarship."[86] Likewise, religious objects were not to be collected and displayed in a

[84]Memorandum by the legal committee of Va'dat Otzrot ha-Golah, 28 March 1946, 3 (CAHJPp3/2059).

[85]Memorandum submitted by the Commission on European Jewish Cultural Reconstruction to Assistant Secretary of State General J. H. Hilldring, 5 June 1946, file ARC 4o 793/212.1, National Library of Israel Archives.

[86]Judah Magnes letter to Dr. J. Zuckerman, counsellor of the United Nations Educational, Scientific and Cultural Organization's Library and Museums section, 29 January 1947, cited in D. Herman 2008, 70n. 130.

museum but, instead, distributed to various synagogues in Palestine and the United States to be used by Jewish communities.

Second, the most controversial request and the one most divergent from traditional restitution law and notions of private property was the demand for "restitution-in-kind."[87] Michael and his colleagues demanded to replace lost Jewish cultural treasures with "comparable objects of like value" from German and Austrian collections.[88] Baron's commission gave the example of the Jewish division of the Municipal Library of Frankfurt, whose impressive Judaica and Hebraica collections, largely donated by Jews, would otherwise remain in Germany where few people would have either the desire or the capacity to make use of it for scholarly or other purposes.[89] Although this request for restitution-in-kind was in line with the Allied Paris resolution of 1946,[90] in American eyes it came too close to revenge. The US military government argued that the seizure of Jewish objects from German institutions that rightfully owned them violated the 1907 Hague Convention and amounted to the "cultural rape of Germany."[91] General Clay feared that this would turn into a legalized looting of German cultural property. While the Americans were sympathetic to Jewish demands for restitution, they rejected the idea of restitution-in-kind, which threatened to blur the line between cultural restitution and cultural spoliation and to contravene their whole policy.[92] As most Jewish cultural objects were in the American zone of occupation, the position of the Americans in this matter prevailed.

It is interesting that, in 2006, law professor Ana Filipa Vrdoljak endorsed a position similar to the one advocated by the Jewish organizations 60 years earlier as a matter of principle for international law: "[I]f restitution is the cessation or reversal of a wrongful act, then restitution-in-kind … reinforces the importance of return of cultural objects for the rehabilitation of the persecuted group."[93]

[87]An early articulation of this demand can be found in the report of the Diaspora Treasures Committee of the Hebrew University, 26 February 1946, which raised the possibility of an additional claim against the German state for "certain compensation including from the cultural treasures of German public libraries" on the grounds that the Germans had proved that they could not be depended upon to preserve Jewish cultural artifacts; that the German people owed the Jewish people damages for the wanton destruction of its culture; and that, in light of the mass murder, the Jewish people had the right to withdraw the gifts it had donated to German institutions. Cited in Zadoff 2015, 208.
[88]See Kurtz 1998, 636.
[89]D. Herman 2008, 124.
[90]"Resolution on the Subject of Restitution attached to the Final Act and Annex of the Paris Conference on Reparations," Paris, 14 January 1946. See Vrdoljak 2006, 143.
[91]D. Herman 2008, 123; Gallas 2019, 100. Hague Convention IV on Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land 1907, 187 CTS 227.
[92]It can be speculated that the Soviet policy of refusing to return cultural objects as a way of compensation also contributed to the American rejection of Jewish claims for restitution-in-kind.
[93]Vrdoljak 2006, 143.

CONCLUSION

Whereas international law today sees criminal law as the high road to dealing with genocide, this article has aimed to shed new light on how cultural restitution became the legal and discursive site in which innovative legal remedies and countermeasures to cultural genocide were developed and tested. Engaging with the criticism that Jewish representatives expressed with regard to the shortcomings of international law reveals the forgotten path they paved, which created a link between criminal law and the law of restitution in an effort to address the aftermath of cultural genocide. The new understanding of the crime prompted initiatives and concerted actions to achieve collective cultural restitution. As we saw, the legal reforms they proposed went far beyond a "return to the status quo ante" and aimed at counteracting cultural genocide perpetrated against peoples and communities. Surprisingly, whereas the efforts to influence the interpretation of genocide at the IMT in Nuremberg mostly failed, the civil path—the attempts to bring about collective cultural restitution—was much more successful, and the Jewish victims managed to persuade the Allies to create a systemic policy to remedy cultural genocide. A reexamination of this early struggle through a legal lens suggests that the civil track provided an important arena for advancing the acknowledgment of cultural genocide and for creating various practices (documentary, political, and legal) that could translate the new concept into action.

The innovative legal framework arising from the postwar restitution struggle, which conceived of cultural restitution as a countermeasure to cultural genocide, may also inform the contemporary debates concerning cultural restitution. These debates are dominated by two prevailing conceptions of cultural property: the nationalist conception, on the one hand, and the internationalist-universalist conception, on the other. The nationalist conception links the territorial nation-state with its territorial cultural heritage. Accordingly, nation-states have a right to the restitution of cultural property that was taken from their territory in an illegal or immoral manner. In contrast, the internationalist-universalist conception of cultural property views national cultures as part of a universal cultural heritage that must be preserved for all humanity rather than for particular national communities.[94] According to John Merryman, the nationalist conception currently has the upper hand, despite some forceful arguments in favor of the universalist conception.[95] He argues that this is the result of an unjustified statist bias, particularly in light of the nation-state's decline in the international arena and the emergence of international human rights, including the protection of international cultural heritage.[96]

[94]See Merryman 1986.
[95]Merryman 1989, 363; see also Stamatoudi 2011, 29–30.
[96]Merryman 1986, 853; Merryman 1989, 363.

https://doi.org/10.1017/S0940739120000235 Published online by Cambridge University Press

The postwar Jewish cultural restitution struggle uncovers a third alternative: a community-centered restitution that recognizes a stateless (transnational) victim group as being entitled to its cultural property and capable of overcoming the claims of nation-states (the state of origin). This conception is based on an understanding of the prohibition of genocide as the protection of a group and its culture, even when it is attacked by its own state. Accordingly, the legal framework introduced by the Jewish cultural restitution struggle created a link between the crime of genocide and collective cultural restitution directly to the victim group as part of a cultural rehabilitation project. This community-centered conception of cultural property is missing from today's debates since it has not been adopted as an international treaty. As a result, the myriad of questions and possibilities opened up by this alternative conception are left out of the discussion, which is limited to the nationalist and universalist conceptions alone.

The pioneering struggle of the Jewish victim group to translate the crime of cultural genocide into legal innovations in international criminal law has gradually disappeared from the memory of international law. Today, in light of attempts to reintroduce the concept of cultural genocide into the jurisprudence of the International Criminal Court,[97] the efforts made by transnational civil litigation in American courts to expand the definition of genocide to include cultural and material dimensions,[98] and increasing claims against European museums for decolonization and restitution of African heritage in their collections,[99] it is more important than ever to return to these early struggles of the 1940s and 1950s and to learn from their innovative conception of collective cultural restitution as a countermeasure to the crime of cultural genocide.

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[99]See Alexander Herman, "One Year after the Sarr-Savoy Report, France Has Lost Its Momentum in the Restitution Debate," *The Art Newspaper*, 12 November 2019.

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